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No. 83-2138

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CITIZENS FEDERAL SAVINGS AND LOAN ASSOCIATION OF DAYTON, OHIO,
Appellant,

v.

VAN W. PAGE, et al.,
Appellees.

On Appeal from the Court of Appeals
Twelfth Appellate District of Ohio

MOTION TO DISMISS OF APPELLEES VAN W. PAGE AND CYNTHIA A. PAGE

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QUESTION PRESENTED

Whether a mortgage which contains a "due-on-sale" clause prohibiting a sale or transfer of the property by the mortgagor without the mortgagee's prior written consent, but permits the creation of a lien or encumbrance subordinate to the mortgage, is, under Ohio law, ambiguous with regard to the transfer of the property by land contract, so as to bar enforcement of the "due-on-sale" clause.

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MOTION OF APPELLEES VAN W. PAGE AND CYNTHIA A. PAGE TO DISMISS

The Appellees, Van W. Page and Cynthia A. Page, respectfully move the Court to dismiss this appeal for the reason that no federal question was properly raised in the state court below and the decision of the Ohio Court of Appeals for the Twelfth District was based on nonreviewable state law.

OPINION

The opinion of the Court of Appeals, Twelfth Appellate District of Ohio, Warren County, Ohio, which the Appellant, Citizens Federal Savings and Loan Association of Dayton, Ohio ("Citizens Federal") seeks this Court to review has now been published at 11 Ohio Bar Reports 562 (1984).

ARGUMENT

The Appellees, Van W. Page and Cynthia A. Page ("Pages") hereby move this Court to dismiss this appeal for the reason that the federal question now urged by Citizens Federal was not properly presented in the state proceedings below and the decision of the Ohio Court of Appeals rests on adequate and independent state grounds. The Pages further submit that this Court does not have jurisdiction to review this case by writ of certiorari and that even if such review is appropriate, the issue presented is not of such significance as to require this Court's attention.

A. THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN AN APPEAL BECAUSE CITIZENS FEDERAL DID NOT QUESTION THE VALIDITY OF ANY STATE STATUTE BEFORE THE OHIO COURT OF APPEALS.

Citizens Federal appeals to this Court pursuant to 28 U.S.C. § 1257 (2). This section states that final judgments rendered by the highest court of a State may be reviewed by this Supreme Court:

> By appeal, where is drawn in question the validity of a statute of any state on the ground of it being repug-

nant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Since the Ohio Supreme Court refused to hear Citizens Federal's appeal, it is the decision of the Court of Appeals of the Twelfth District of Ohio from which Citizens Federal appeals. *Sullivan* v. *Texas,* 207 U.S. 416 (1906). *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U.S. 157, 160 (1954). The opinion of the Court of Appeals for the Twelfth District of Ohio is reprinted in the appendix of Citizens Federal's jurisdictional statement, p.p. 1a-10a. A review of this opinion including the assignments of error Citizens Federal presented to the Ohio Court of Appeals reveals that at no time did Citizens Federal make any claim that any Ohio statute was invalid as being repugnant to the United States Constitution or the laws or regulations of the United States.[1]

Citizens Federal raised two assignments of error before the Ohio Court of Appeals. The first assignment of error was a claim by Citizens Federal that the Defendant/Appellees Ethridges did not have standing to seek summary judgment.[2] This assignment of error was obviously not a challenge to the validity of any state statute based on federal grounds. It was merely a question of Ohio procedural law.

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[1] Citizens Federal's two assignments of error to the Ohio Court of Appeals are reprinted in full in the Court's opinion. See Appellant's appendix p.p. 3a, 4a.

[2] The Appellees James A. Ethridge and Eva N. Ethridge were the vendees to the land contract with the Pages. The Ethridges filed a motion for summary judgment asking that Citizens Federal's complaint be dismissed. The Pages also filed a motion for summary judgment at the trial level, but the trial court only granted the Ethridge's motion.

In its second assignment of error, Citizens Federal asserted that the trial court erred in failing to determine that a land contract sale of real property triggered a due on sale clause in the mortgage between Citizens Federal and the Pages. This assignment of error raised a question of the construction of the mortgage contract, but did not in any way raise the question of the validity of a state statute. A review of the entire opinion of the Ohio Court of Appeals reveals that the Court certainly did not consider that Citizens Federal was challenging the validity of any state statute. The Court of Appeals does not even mention a state statute in its decision, much less uphold the validity of a state statute.

Since there was no state statute challenged and held valid in the proceedings before Ohio Court of Appeals, Citizens Federal fails to meet the requirements of an appeal plainly set out by 28 U.S.C. § 1257 (2). Citizens Federal, however, has claimed in its jurisdictional statement that the decision of the Ohio Court of Appeals was a construction of Ohio Revised Code §§ 5313 *et seq.* See Citizens Federal's jurisdictional statement, p.p. i, ii, 5, 11, 13. This is a blatant attempt by Citizens Federal to misrepresent the holding of the Ohio Court of Appeals, and by so doing, to manufacture a basis for its appeal.[3]

Citizens Federal has claimed that Ohio Rev. Code §§ 5313 et seq., "has been construed and applied by an

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[3] Citizens Federal is aware that it cannot challenge the validity of Ohio Rev. Code. § 5313 et seq. for the first time in its jurisdictional statement. *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692 (1928); *Whitney* v. *California*, 274 U.S. 357, 362 - 363 (1926). Citizens Federal, having failed to challenge the validity of a state statute below, as needed for grounds for appeal, is now attempting to misrepresent the proceedings below to convince this Court that a state statute was indeed drawn into question and held valid.

Ohio Court so that upon transfer of real property by land contract, a lien subordinate to a mortgage is created." Citizens Federal's jurisdictional statement, p. i. Even if the Ohio Court of Appeals did construe Ohio Rev. Code § 5313, it would not give this court a basis for review by appeal. Where the validity of a state law is not drawn into question, but merely its construction, no federal question arises. *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 680 (1929). Thus, even if Citizens Federal's inaccurate portrayal of the Court of Appeals' opinion is taken as correct, this Court still has no jurisdiction for appeal, pursuant to 28 U.S.C. § 1257 (2).

B. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE DECISION OF THE TWELFTH APPELLATE DISTRICT OF OHIO BY WRIT OF CERTIORARI BECAUSE NO FEDERAL RIGHT WAS "SPECIALLY SET UP OR CLAIMED."

Citizens Federal asks that if an appeal pursuant to 28 U.S.C. § 1257 (2) is not appropriate, that its appeal should be considered as a petition for writ of certiorari under 28 U.S.C. § 1257 (3). This section grants the Court jurisdiction to review state court decisions as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

In reviewing the decision of a state court, this Supreme Court is limited to those specific federal questions that were properly raised in the state courts. *Witney* v. *California*, 274 U.S. 357 (1926); *Dewey* v. *Des. Moines*, 173 U.S. 193 (1898). In order to determine whether a federal right was "specially set up or claimed" within the meaning of 28 U.S.C. § 1257 (3), it is necessary to determine whether the "petitioner satisfied the state rules governing presentation of the issues." *Amalgamated Food Employees Union* v. *Logan Plaza*, 391 U.S. 308 (Justice Harlan's dissent at 334) (1967). A federal question is not properly raised if it does not comply with the requirements of state law. *Parker* v. *Illinois*, 333 U.S. 571, 574-575 (1948); *Michel* v. *Louisiana*, 350 U.S. 91 (1955).

In Ohio, in order for an issue to be correctly before the Court of Appeals, the issue must be brought forth as an assignment of error. Appellate Rule 12 (A); *Duff* v. *Corn*, 84 Ohio App. 403 (1949); *Fishback* v. *Baldasarro*, 62 Ohio Law Abs. 319 (1952). Error which has not been specifically assigned is considered waived. *Pollack* v. *Cohen*, 32 Ohio St. 514 (1972).

As was seen from the review above, Citizens Federal's assignments of error to the Ohio Court of Appeals did not challenge the validity of a state statute. It is also equally clear that Citizens Federal's assignments of error failed to "specially set up or claim" a federal right, title, privilege or immunity. As was discussed above, Citizens Federal only raised two assignments of error to the Court of Appeals. The first assignment of error dealt with the standing of the Appellees Ethridges to make a motion for summary judgment. There is no question this assignment of error failed to raise any constitutional issues. The second of Citizens Federal's assignment of error was stated as follows:

> "The Trial Court erred in the prejudice of Plaintiff-Appellant in determining that a land contract sale of real property is not an event which triggers a due on sale clause in a mortgage which a federally chartered savings and loan association is the mortgagee and which clause contains language which reads: "if all or any part of the property or an interest therein is sold or transferred by borrower without lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to the mortgage . . . lender may, at lender's option, declare all the sums secured by this mortgage to be immediately due and payable."

28 U.S.C. § 1257 (3) requires that the claim of a federal right be "specially set up or claimed". Citizens Federal failed to assert the federal right in its assignment of errors and therefore is unable to invoke the jurisdiction in this Court to review the Ohio Court of Appeals decision by writ of certiorari. As is stated by this Court in *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655 (1896), "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averrment so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

C. THE DECISION OF COURT OF APPEALS OF THE TWELFTH DISTRICT OF OHIO IS NOT REVIEWABLE BY THIS COURT BECAUSE IT RESTS ON ADEQUATE, INDEPENDENT STATE GROUNDS.

This Court will not review a decision of a state court which rests on adequate and independent state grounds. *Berea College* v. *Kentucky,* 211 U.S. 45, 53 (1968); *Fox Film Corporation* v. *Muller,* 296 U.S. 207 (1935). Where only the construction of a state law — but not its validity — is challenged, no federal question arises. *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U.S. 673 (1929).

Since Citizens Federal failed to challenge the validity of a state statute and failed to raise a federal right, it is not surprising that the state court's decision is based on nonfederal grounds. The Ohio Court of Appeals reviewed the various federal statutes and regulations and concluded that Citizens Federal did indeed have a right to draft a mortgage which contained a "due-on-sale" clause that would be triggered by a land installment contract. After making that determination which was consistent with federal law, the Court then looked to the language contained in the mortgage between Citizens Federal and the Pages. In reviewing the mortgage contract to determine the rights of Citizens Federal and the Pages, the Court complied with explicit direction of 12 C.F.R. § 545.8-3 (f). This regulation provides that federal savings and loan associations have the right to include a "due-on-sale" clause in their mortgages and that the exercise of such "due-on-sale" clause by the savings and loan "shall be exclusively governed by the terms of the loan contract and all rights and remedies of the association and borrower shall be fixed and governed by that contract." Thus, the Ohio Court of Appeals properly looked to the

contract to determine whether Citizens Federal had the right to foreclose its mortgage. Since the issue before the Court of Appeals was the construction of the contract between Citizens Federal and the Pages, there can be little doubt that the decision of the court of appeals was a determination based on state law.

This Court determined in *First Fidelity Federal Savings and Loan Association* v. *de la Cuesta,* 458 U.S. 141 (1982) that the federal regulations regarding "due-on-sale" clauses preempt contrary state law which attempt to prohibit the use of these clauses. This Court did not hold in *First Fidelity Savings and Loan Association* v. *de la Cuesta, supra,* that the Board's regulation "occupy the field of "due-on-sale" law or the entire field of federal savings and loan regulations." *First Fidelity Savings and Loan Association* v. *de la Cuesta, supra* at 159, n. 14. The fact that federal regulations give savings and loans the right to include "due-on-sale" clauses in their mortgages does not mean that savings and loans are then immune from principles of equity or basic laws of construction of contracts. *First Federal S & L Assn. of Toledo* v. *Perry's Landing,* 11 Ohio App.3d 135 (1983); *First Federal S & L Assn.* v. *Lockwood,* 35 So.2d 156, 160 (Fla. App. 1980).

The Ohio Court of Appeals construed the Citizens Federal mortgage based on Ohio law. The relevant language, found at § 17 thereof is as follows:

> 17. Transfer of the Property; Assumption. If all or any part of the property is sold or transferred by Borrower without Lender's prior written consent, excluding (a) creation of a lien or encumbrance to this Mortgage.[4]

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[4] The mortgage between Citizens Federal and the Pages is reprinted

The Court found the contract to be ambiguous. In Ohio the ambiguity in a contract should be construed most strongly against the party who drafted the instrument. *Central Realty Co.* v. *Clutter*, 62 Ohio St.2d 411 (1980).

Since the court of appeals determined that the contract was ambiguous as to the right to foreclose, the court of appeals refused to effect a forfeiture of the mortgage based on the ambiguous contract submitted to the Pages by Citizens Federal. The ambiguity of the clause with which Citizens Federal seeks to foreclose, was recognized by the Federal Home Loan Bank Board in the regulations adopted pursuant to the Garnes St. Germaine Depository Institution Act of 1982. 12 C.F.R. § 591.5 provides limitations on the exercise of "due-on-sale" clauses for nonfederal lenders. This regulation is very similar to 12 C.F.R. § 545.8-3 (g) which was in effect at the time the Pages and Citizens Federal entered into their contract. The main difference is that in the new regulation drafted pursuant to the Depository Act, additional language was added. Section 591.5 (b) (1) provides:

> A lender shall not (except with regard to a reverse mortgage) exercise its option pursuant to a due on sale clause upon:
>
> > (i) The creation of a lien or other encumbrance subordinate to the lenders security instrument which does not relate to a transfer of rights of occupancy in the property: *Provided, that such lien or encumbrance is not created pursuant to a contract for deed.*[5] (Emphasis added)

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in its entirety in Citizens Federal's jurisdictional statement, p.p. 21(a) - 35(a).

[5] The italicized portion of 12 C.F.R. § 545.5 is new. Compare with 12 C.F.R. § 545.8-3(g)(1)(i), which is the same regulatory language

The need by the Bank Board to add the additional language clarifying its regulation is a recognition on its part that the language of the prior regulation which was substantially incorporated in the mortgage was ambiguous with regard to land contracts and needed to be clarified.

The Court of Appeals' decision regarding the ambiguity of the due on sale clause was not only a question of state law, but it was also a correct construction of the contract between the Pages and Citizens Federal.

D. THIS CASE IS NOT OF SUFFICIENT IMPORTANCE FOR THIS COURT TO REVIEW BY WRIT OF CERTIORARI.

Citizens Federal would lead this Court to believe that if this case is not overturned, the savings and loan industry is threatened. Citizens Federal greatly exaggerates the importance of this case.

The Court of Appeals' decision from the Twelfth District of Ohio will not cause the collapse of the savings and loan industry. This decision has limited precedential value. As was pointed out by Citizens Federal, numerous other courts outside the state of Ohio have dealt with the same issue, and have upheld the right of the savings and loans to foreclose. See cases listed in Citizens Federal's jurisdictional statement, n. 14. In addition, there is already an unreported decision in the state of Ohio which would appear to be contrary to the decision Citizens Federal seeks to appeal. *First Federal S & L Assn. of Toledo* v. *Perry's Landing, Inc., supra.*

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without the clarification. 12 C.F.R. § 545.8-3(g)(1)(i) was substantially incorporated in the mortgage contract as pointed out by Citizens Federal. Citizens Federal Jurisdictional Statement, p. 12.

CONCLUSION

Citizens Federal did not raise a federal question in the Court of Appeals, and the Court of Appeals did not base its decision on federal law. As a result, this Court has no jurisdiction to review the decision of the Court of Appeals of the Twelfth District of Ohio, either by appeal or by writ of certiorari. Even if such jurisdiction did exist, the Pages respectfully submit that this Court should dismiss this appeal since the Court of Appeals' decision is correct and is of no great public importance.

August 17, 1984

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